EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Kerrane	**v**	**National Grid (UK) Limited**

Heard at: Birmingham **On**: 22 to 29 January 2024

Before: Employment Judge Robin Broughton
Mr P Davis
Mrs H Astill

Appearances:
For Claimant: Dr Ahmed, counsel
Respondent: Ms C Davies, counsel

JUDGMENT & REASONS

The Judgment sent on 30 January 2024 recorded the tribunal's unanimous decision as follows:

1. The Claimant's claim of direct age discrimination fails and is dismissed.

2. The claimant was dismissed unfairly.

3. The failures, however, were procedural and would have made no difference to the outcome (Polkey).

4. The deemed reason for dismissal under s139 Employment Rights Act 1996 (ERA) is redundancy.

5. The claimant is not entitled to a redundancy payment as he unreasonably refused an offer of suitable alternative employment from an associated employer (ss 141 and 146 ERA).

6. The parties are reminded of s121 ERA.

7. The parties had requested a stay in relation to remedy issues but are to update the tribunal on the position within 2 months.

Written reasons were requested and the following are provided (with apologies for the delay caused by technical and resourcing issues and the Employment Judge suffering a bereavement):

The facts

1. It was common ground that part of the reason for these claims being brought by the claimant was to obtain a finding that his dismissal was, in fact, by reason of redundancy due to his belief that this would enable him to be entitled to early unreduced pension and an enhanced redundancy payment. Both of those matters were not, however, part of the claim before us.

2. The respondent's case was that it was not a redundancy situation and that they had acted fairly and reasonably in any event.

3. We had a significant bundle – over 630 pages – and we heard from the claimant and a number of witnesses on behalf of the respondent. The issues were agreed between the parties, and we were also provided with a chronology.

4. The respondent is part of the National Grid group, with National Grid plc being the ultimate holding company. There was also another company within the group, National Grid Gas plc.

5. A number of functions were carried out by the respondent using their employees to provide services to companies across the group and the claimant was employed by the respondent as a pensions finance manager in the corporate function in their pension team, a part of the finance team.

6. His role was a band C, and his normal place of work was originally in London albeit it had subsequently been agreed that he could relocate to their Warwick office.

7. He reported to Eddie Hodgart, the group head of pensions, and had one direct report – the regulatory manager.

8. At the time of Mr Hodgart' appointment, it appears that neither the claimant nor the respondent thought he was suitable for promotion to the group head of pensions role, although it appears that was the claimant's aspiration.

9. We saw a number of his annual performance reviews that showed that he was addressing development areas in relation to his skills, abilities and competencies in a positive manner in the intervening period.

10. We were referred to a number of terms of the claimant's contract of employment. The principal ones were clause 2.1, which was a general provision which suggested that employees should perform such duties and exercise such powers as the company may from time to time reasonably assign and those related to the company or any associated company.

11. There was also a provision at clause 2.5 saying that the claimant could be required to work in any other capacity of a reasonably similar nature to his contractual duties. We were at one stage referred also referred to a novation provision in the contract, although it appears that it was common ground that provision did not apply in the circumstances of this case.

12. It was also not in dispute that the claimant's main duties consisted of three primary tasks in relation to three UK pension schemes. Those were

    a. the regulatory affairs of those schemes

    b. representing the respondent in discussions with trustees and in relation to investment decisions and

    c. negotiating with the trustee boards on actual valuations.

13. One of the three schemes related to the respondent's gas business. The other two to the retained electricity business.

14. The claimant was a solid performer and was clearly highly regarded by his manager, Mr Hodgart.

15. As mentioned, we were referred to a number of the claimant's more recent appraisals and considered his pay reviews and his bonus entitlements. His pay reviews, whilst modest, reflected what we heard was an already above market rate of salary.

16. The claimant's performance reviews largely reflected on target for 100% performance related bonus. It was clear that some employees would receive higher, having achieved stretch targets but a significant number of others would receive lower bonus entitlements, having not met their performance targets in full. This fed into subsequent considerations to which we shall return.

17. In March 2021, National Grid plc announced its intention to sell a majority equity interest in their gas business. They were intending to sell 60% of the equity, whilst retaining 40%, at least initially.

18. To facilitate this sale, they determined that they would need to separate out the services provided to the gas business to ensure that it would be independently operational.

19. As a result, corporate functions were reviewed. These included the finance and shared services department in which the claimant worked.

20. The respondent apparently worked with the consultants, Kornferry, in designing the organisational structures and the process for getting there, in relation to the shared service employees.

21. A part of that process involved considering the extent to which roles would significantly change and/or whether they were aligned to the retained electric business, the divesting gas operations, or fell somewhere in between.

22. The idea was that those employees who were not clearly aligned with either the retained electric or the new gas business were going to be allocated to one or the other by an assessment process.

23. The proposed structure for the new gas business included a head of pensions role, a smaller scale and simplified version of the role held by Mr Hodgart, dealing with just one pension scheme as opposed to overseeing that scheme, two further UK schemes as well as a number of schemes in the US.

24. To assess which individuals were affected by the separation, the respondent identified four categories in their process which were those

    a. who were to be retained as not being substantially affected by the restructure,

    b. where there was going to be a reduction in the number of people doing similar roles (which didn't apply in this case)

    c. where there was a substantial change to their roles

    d. who needed to be allocated between the two businesses.

25. In relation to the first of those categories, it was determined that, where at least 80% of the role was unchanged, employees would simply be allocated to the relevant business.

26. It was unclear who did the initial categorisation of employees in the pensions department, but it appears that both the claimant and GB, the pensions strategy manager, another band C, were initially placed in category 3 (c above) suggesting that somebody thought that they were both subject to significant change in their roles.

27. However, in the initial internal review process, it appears that HR, in conjunction with Ms Lewis, the group treasurer, couldn't justify the catagorisation for GB as it was said that more than 80% of his role would stay the same. The reason given was that GB had a strategy role that also encompassed the US business and so his duties weren't simply split across the three UK pension schemes as was the case for the claimant.

28. In the claimant's case, his work was roughly equally allocated between the three UK schemes. Mr Hodgart' evidence was that GB's role was only about 5% related to the UK gas scheme.

29. As a result, following that initial internal review, GB was re-categorised as category 1 (a above). This was before any of the affected employees were notified or aware of the process.

30. The claimant was placed in category 3 because one third of his role related to the gas scheme which, therefore, was more than 20%. That work was moving to the gas business and so he had less than 80% of his role in the retained business, or the new business.

31. We heard from the respondent that those aspects of his role that did remain were to be spread amongst existing members of the retained business. They did not go solely to GB, as suspected by the claimant, albeit that wasn't something he would have been aware of at the time.

32. As a result of this categorisation, the claimant was in scope for consultation and the subsequent assessment and allocation process. His role of pension finance manager was not part of the new structure in the retained business of the respondent.

33. There was, therefore, no dispute that, within the pensions team of the respondent, who were continuing to manage the retained business, there was to be a reduced requirement for one pensions manager at band C. The respondent's case was that, across the group, there was no such reduction.

34. Following that initial internal categorization, on 12 October 2021, the respondent announced the commencement of the consultation process with affected employees. The claimant was notified that he was placed in category 3 and informed of the proposed assessment and allocation process that would follow thereafter.

35. He received a consultation document providing information on the reasons for the consultation, the process proposed and a timeline of what was anticipated to happen. It was stated that only those individuals who were not allocated to roles would go through a redeployment process and, indeed, that those who were in scope were frozen out of any deployment opportunities in the initial stages.

36. The process provided an opportunity for affected employees to discuss their position and, it was said, to ensure that the talent was to be aligned with the right roles. It referenced collective consultation and the ability to ask questions, albeit there didn't appear to be any particular process for challenging the categorisation.

37. Shortly thereafter, the claimant spoke to Mr Hodgart and said that he was informed of the head of pensions role in the gas business and told that he would have a strong chance of getting it if he applied.

38. Mr Hodgart denied saying that the claimant would need to apply. That certainly wasn't the process that had been announced nor that which was followed, which was about allocation, rather than application.

39. Pending assessment and allocation, employees could not apply for internal vacancies which is, perhaps, unusual in these circumstances. However, the respondent said that this was to ensure that they could appropriately populate the new, separated gas business.

40. Collective consultation was to be carried out by the joint staff services forum and a management forum set up for this purpose during the re-organisation. The claimant chose not to actively participate.

41. That process did not formally commence until 26 October 2021. The claimant didn't raise any issues during consultation about the categorisation of his role, nor did he challenge the new structures at that stage.

42. There was no consultation, it appears, either individually or collectively, about the process itself, certainly not at the outset, nor prior to categorisation. That said, the respondent argued that it was a process that they had followed previously and that had been approved by collective consultation in an earlier reorganisation.

43. The collective consultation process, once commenced, did appear genuine. For example, we note that a review process which was put in place to consider allocations was revised as a result of collective consultation.

44. On 5 November 2021, Mr Hodgart was asked by Korn Ferry to carry out a competency assessment for those employees in his team who were within scope. He was provided with various documentation in terms of how to carry that out, submitting the outcome to Korn Ferry on 12 November.

45. It was, essentially, a scoring sheet where he was to grade the in-scope employees on a scale of 1 to 4 in relation to a number of a categories, the majority of which were about personal skills, but one or two reflected more technical abilities.

46. The claimant was scored either a 3 or a 4, equating to advanced skills or expert against the matters that he was required to assess. In the comments Mr Hodgart stated that he considered the claimant to be strong technically and focussed on meeting stakeholder needs as well as being ambitious, intelligent and a quick learner.

47. The process suggested that this assessment would be subject to challenge by HR and Korn Ferry, although there was no evidence that it was at that stage.

48. The initial role fit exercise of in scope individuals, it was said, was carried out by Korn Ferry, although the process appeared to suggest that it should be done by managers.

49. Ultimately, however, in this case it appears that Mr Hodgart did have an eye on the new role in the gas business when assessing the claimant.

50. The claimant was given high percentage role fit scores, both for the head of pensions role in gas and for a lower level of pensions delivery manager role, seemingly by Korn Ferry. It was far from clear how those percentages were derived, not least because the majority of the assessment scores were related to personal skills as opposed to the technical aspects of the job.

51. There was no dispute, however, that the head of pensions role in gas was at the same band as the claimant's existing position, had a similar salary and benefits package was based in the same location.

52. The results of this assessment exercise were then considered at what was called an allocation summit on 3 December 2021. That was due to be attended by representatives from the respondent's HR team, from Korn Ferry, the chief financial officer of the gas business and Mr Hodgart.

53. It was Mr Hodgart who, ultimately, made the determination that the claimant should be allocated to the head of pensions role in the gas business. At the time, he considered this to be a supportive act on his part aiding the claimant's career development, given what he understood to be his ambition.

54. Mr Hodgart considered that the claimant had the right skills and capabilities to perform the role and that he would be supported in any event by transitional arrangements that were to be put in place for at least the first 12 months.

55. The claimant was informed by Mr Hodgart, on 14 December 2021, of the outcome of the assessment and allocation process and, specifically, that he had been allocated to the head of pensions role in the gas business.

56. It appears that this came as a surprise to the claimant, and he was unhappy, as he believed he was going to have a choice, albeit that was not what the process provided for. He immediately wanted to know what would happen if he refused the new role, seemingly because he wanted redundancy. Mr Hodgart informed him that it was not considered to be a redundancy situation but suggested that he speak to HR in any event.

57. That conversation was followed up by email on 15 December 2021, reiterating the respondent's view that the claimant would not be entitled to redundancy benefits whilst also explaining that there was a process by which he could request a review of his allocation. It was again suggested that he speak to HR and, potentially, to the CFO of the gas business.

58. There followed a flurry of emails over the next day or two which we considered important for our deliberations.

59. The initial email reply from the claimant, on 15 December 2021, stated that he was happy to have a conversation with the CFO of the new gas business

and specifically stated that he wouldn't turn down a role *if it meant the alternative was an exit with no redress*. However, later that day, when the claimant emailed the gas CFO, he complained that he had not been involved in the process in any meaningful way and they hadn't even spoken. The claimant was already seeking to assert, it seemed, that trust had irrevocably broken down.

60. Later on that same day, in a further email to Mr Hodgart, the claimant sought to explain why he felt that he could not accept the role which included

    a. the fact that he hadn't had a discussion with the chief financial officer,

    b. that he hadn't even had the job description and

    c. that the CFO may not be aware of his reasons for not considering the appointment to be advisable.

61. He went on to state that, if the offer of the new role was still considered suitable, he wanted to know what the next steps would be to appeal the decision.

62. It appears, therefore, that the claimant was not interested in, or even open to persuasion in relation to, the suitability of the alternative role. Rather, he wanted to persuade the gas business that he wasn't suitable and, if they still did not accept his position, he would be looking to appeal.

63. The claimant went on to suggest that being required to accept the role would have very negative consequences for both the business and him personally. He asserted that the offer should be reconsidered before the parties embarked on a journey which, it was suggested, would not be in their best interests and was likely to be acrimonious and run for years to come.

64. That appears to have been an accurate prediction, albeit resulting from the claimant's adamance that he should be made redundant (and receive a six figure redundancy entitlement and far higher pension enhancement).

65. The next day, the claimant emailed Ms Lewis, group treasurer and Mr Hodgart' line manager, stating that he had a clear aversion to taking up the role, saying that he considered it to be a poor strategic fit with his skills. He again asserted that the respondent was sleepwalking into an arduous and acrimonious conflict, whilst acknowledging that he had always found Ms Lewis to be fair in the past.

66. Alongside this, there were further emails to Mr Hooper, gas CFO, with the claimant suggesting that he didn't think his issue was being taken seriously and would lead to rapid escalation.

67. All of these negative assertions were made before the claimant had even received the job description of the new role, let alone had any meaningful discussions about it. Before us, the respondent suggested that this was because the claimant had decided from the outset that he wanted his

significantly enhanced redundancy benefits and, as a result, his contentions about the alleged unsuitability of the new role were not genuine.

68. The claimant received the job description on 17 December 2021 and responded to say that he considered it to be similar to the existing head of pensions role, albeit on a significantly reduced scale. He asked why he hadn't been allowed to apply when the current overall head of pensions (Mr Hodgart) had been appointed a couple of years previously if he was now deemed suitable.

69. The claimant was informed about the review process which had been put in place as a result of the collective consultation for those who disputed their assessments or allocation. He asked HR whether or not he would be able to challenge the categorisation as well within that process and was told that he could, albeit the process appeared to suggest otherwise.

70. In any event, the claimant was encouraged to seek a review if he was unhappy and did so in writing on 10 January 2022. His principal reason was that he said that the new gas role was significantly different and included elements which he said he had little or no experience of. Specifically, governance, integrating pensions with reward and the accounting implications of the role.

71. He considered this amounted to half of the new role as they were three of the six main areas of responsibility. This was disputed on the part of the respondent who argued that they were smaller, the claimant had some experience in some areas and support would be offered in the others.

72. The claimant was also concerned that he would have no immediate direct reports and would be responsible for recruiting and populating the new team. He went on to state that he understood that, if he was allocated to the role, he would have a short period of time (up to around three months) to resign and claim constructive dismissal.

73. It appeared, therefore, that the claimant was in receipt of some advice from somewhere, whether accurate or not, as indicated by his earlier intimations of protracted legal proceedings if he wasn't made redundant. That said, he asserted that he had not got to the stage of formally instructing solicitors. He was, nonetheless, aware of the potential for such things as a trial period when considering the suitability of alternative employment in a reorganisation situation.

74. Seemingly confirming this, the claimant said that he had been led to believe that his chances of success when going down a litigation route were significant. Indeed, he specifically asserted that, if the reviewer found against the appeal, he would like to request a full description of the process followed in reaching that decision and specific details of how the decision was reached and any other relevant information.

75. There was some dispute about what that may have meant with the claimant arguing before us that it related to the entire restructure. It seems to us,

however, that, in context, it must have referred only to the review, given that the request was for a description of the process followed in reaching ***that*** decision.

76. The claimant said that he was looking for the allocation decision to be reversed, again to avoid a protracted employment dispute.

77. Darren Gibb, the head of global procurement of the respondent, was appointed to carry out the review and, as part of that review, Mr Hodgart was asked to explain the rationale for the allocation. He did so by email on 14 January 2022.

78. It was unclear when that email was provided to the claimant, although in his witness statement he acknowledged that he believed he had received it at some stage.

79. Mr Hodgart went into significant detail about his rationale, including the claimant's employment history, his experience and also Mr Hodgart understanding that the claimant had been seeking advancement in his career with greater responsibility and greater strategy involvement.

80. Mr Hodgart also detailed what were considered to be the claimant's strengths and the reasons for his high scores in the assessment process as well as looking at the core requirements of the new role.

81. There was no dispute that, in relation to integration risk management, regulatory management and other risk management activities, the claimant had strong skills and experience in those areas.

82. In relation to governance, Mr Hodgart split that into trustee and corporate governance as the claimant did have experience of the latter. It was acknowledged, however, that the claimant had limited experience in relation to trustee governance, but Mr Hodgart explained why he did not consider that to be a problem.

83. Mr Hodgart also addressed the issue of HR pensions and reward, which he considered to be less than 1% of the role and one that would be led by a benefits manager in the new business in any event. In relation to the issue of accounting work, he said that he'd had no accounting experience when taking on his much larger head of pensions role and so he didn't see that as an issue.

84. He didn't specifically respond to the claimant's review application because he hadn't seen it but, it seemed to us, that his detailed response adequately addressed the key areas that had been raised by the claimant.

85. The review meeting took place on 28 January 2022 in advance of which the claimant had received his assessment scores. Perhaps surprisingly, the claimant sought to argue that these were unduly generous, arguing that his past performance was considered to have been average or below average by virtue of his bonus payments. That was not accepted by the respondent.

86. In any event, they said the scoring was based on his seniority and experience and his significant development in recent years in some of the areas that had previously been identified as necessary for his advancement.

87. We were satisfied that the contemporaneous performance review documents did reflect the respondent's case on that point and support what they were saying. The claimant arguing that he had been scored too generously was an attempt to say that the respondent was endeavouring to avoid making him redundant, but it seemed more likely that it was the claimant's attempt to distance himself from his apparent suitability for the role.

88. We did not consider that there was any evidence to support the submission that avoiding the claimant's redundancy, or entitlements was on Mr Hodgett's mind when he was carrying out the review. He appeared to us to be a supportive manager who understood the claimant to be looking for career development and who believed that the gas role was a good fit for him, and he demonstrated that throughout the process.

89. The claimant did not raise any concerns other than in relation to the alleged unsuitability of the role. Specifically, there was no mention at this stage of any of the subsequent allegations about how he claimed the role may adversely affect him personally.

90. The claimant did, in the review meeting, talk about the history of his experience with the respondent and seemed to rely heavily on the fact that he believed he was not deemed suitable for the head of pensions role when Mr Hodgart was appointed. That was a much bigger role, at a higher grade and pay level, and was prior to the claimant's development in key areas in the intervening period. It also did appear to confirm that he had aspirations towards a "head of" role.

91. The claimant acknowledged that the business may well have thought that he would welcome the gas role and wanted to appoint him but, again stated that he had taken legal advice and felt he had a strong case. This was clearly a reference to his desire for what he believed were his redundancy entitlements, again intimating that a dispute would be an arduous process.

92. That said, he claimed that he had originally wanted to be considered for other roles in the retained electricity business, but he felt that horse had bolted and the only option for him would be voluntarily redundancy. Nonetheless, it was the claimant's view that he, or at least GB, had been wrongly allocated in the categorisation process.

93. That was not something that was taken further in the review, despite having been raised. However, as already mentioned, we were satisfied by Mr Hodgart evidence that, due to his strategy work in the US and other matters, GB's role was more than 80% unchanged.

94. Apparently in considering the review, Mr Gibbs spoke to both Ms Lewis and Mr Hodgart about the allocation process and read the performance reviews.

Those were not noted conversations and there was no further documentation for us beyond the reviews themselves.

95. It was, however, acknowledged by Mr Hodgart that such a conversation took place and Mr Gibb wrote to the claimant on 11 February 2022 informing him of the outcome. He offered to speak to the claimant if he wished, albeit added that the outcome would remain unchanged.

96. There was no evidence of any direct feedback to the claimant regarding Mr Hodgart' assessment of the requirements of the new role, nor any opportunity to expressly challenge those.

97. Mr Gibb concluded that the gas head of pensions role was one that the claimant had the skills to perform and, given the support from the transitional services agreement and the ability to recruit additional help in areas needed, it was felt that the allocation to the gas head of pensions role should stand.

98. It is worth remembering at this stage that the new gas company was to remain 40% owned by National Grid and so this was not a case of using the exercise to exit certain employees. Rather, it was necessary to appropriately populate the new business for the benefit of all concerned, including opportunities for valued employees like the claimant.

99. The outcome letter didn't specifically address the claimant's direct concerns about the three areas of the role that he felt he was not suited to and so, on 14 February 2022, the claimant responded saying that he didn't feel those points had been adequately addressed. That said, as mentioned, it was unclear at what point he received Mr Hodgart' note that had been provided for the purposes of the review that did, in our view, adequately address those alleged concerns.

100. On 23 February 2022, the claimant was emailed a letter, following the review, saying that he would need to agree to his contract being novated to the new National Grid Gas business, a separate legal entity, still within the group at that stage.

101. The claimant asked for more time to consider whether to sign the novation agreement, in order to obtain legal advice and that was granted.

102. In the meantime, on 2 March 2022, Mr Hodgart wrote to him to confirm that his allocation to the role of head of pensions in the gas business would take effect from 1 April 2022, that all his terms and conditions would remain unchanged and that this was subject to signing the novation letter.

103. On 4 March 2022, the claimant wrote to HR repeating that he believed that he was being made redundant if he didn't sign the novation letter, despite having been repeatedly told otherwise by the respondent. He asked if the respondent had an appetite to resolve the situation without recourse to an employment tribunal.

104. On 7 March 2022, Mr Hodgart wrote to ask the claimant to attend a formal meeting, on 11 March, in relation to whether he intended to sign the novation letter. That letter specifically stated that not signing the novation letter would mean that the claimant would not be able to perform the role in NGG as he would not be legally employed by them. It went on to state that there was currently no role available to him in the retained electricity business and it would be untenable for him to continue to be employed without a role in either.

105. The letter went on to state that, at the meeting, Mr Hodgart would have to decide whether to dismiss the claimant as a result of his refusal to accept the gas role.

106. Mr Hodgart reiterated the respondent's belief that the claimant was not entitled to redundancy or severance pay, because he had been offered what was said to be suitable alternative employment and the respondent considered that he did not have reasonable grounds to refuse.

107. That meeting took place on 11 March 2022, and the claimant confirmed that he did not intend to sign the novation letter as he considered the gas head of pensions role was not a suitable alternative.

108. He said that this was due to there being areas of the new role that he was less familiar with. He said this would cause him stress and anxiety and may require him to work longer hours. This was the first time that those points had been raised by the claimant.

109. The claimant asked for confirmation that he was being dismissed for refusing to sign the novation agreement and that he would still get his full unreduced pension from the age of 50.

110. Mr Hodgart adjourned the meeting and then reconvened, explaining that he had made the decision to dismiss due to the claimant's refusal to accept the novation of his contract to the gas head of pension role.

111. The decision was set out in a letter dated 11 March 2022, explaining again that Mr Hodgart considered the gas role to be a suitable alternative. It went further to state that, in Mr Hodgart's view, the claimant had a contractual duty to perform alternative duties on behalf of National Grid Group and that his refusal to do the gas role was inconsistent with that duty. He again stated that it was not a redundancy situation.

112. In the reasons for dismissal, it was stated that the claimant's current role of senior pensions manager would cease to exist in the organisational structure from 1 April 2022.

113. The claimant was offered the opportunity to appeal, and Mr Hodgart also contacted him to see if they could arrange a suitable leaving do.

114. By this stage, the respondent had seemingly decided not to wait until the transfer of operations to the gas business on 1 April 2022.

115. There did not appear to be any consideration of whether there were other alternative employment or redeployment opportunities within either the gas or the retained businesses.

116. As mentioned, the process had provided that, prior to allocation, those in scope were excluded from redeployment and, after allocation, were only allowed to look at redeployment in the business to which they had been allocated.

117. There was no mention by either side of the possibility of a trial period.

118. On 17 March 2022, the claimant submitted an appeal. The appeal was not against the dismissal itself but, rather, the decision that he had not been made redundant, again seemingly confirming the respondent's perspective on the claimant's motivation throughout.

119. The claimant also considered that his contract had been breached and that he had suffered indirect age discrimination.

120. He reiterated his assertions about why he considered the gas head of pensions role was unsuitable and why he said it was reasonable for him to refuse it. He was, in short, seeking his enhanced pension and redundancy pay.

121. Nicholas Ashworth, director of investor relations at the respondent, was appointed to hear the appeal which was held on 12 April 2022. Mr Ashworth said that he reviewed the documents from the process and also spoke to Mr Hodgart, Ms Lewis, Mr Hooper and HR.

122. He set out his decision by letter on 27 May 2022, in which he explained that he felt it was unreasonable for the claimant to have refused to novate his contract and that he did not consider that he was redundant.

123. Indeed, in the appeal outcome letter, he set out the statutory provisions in relation to redundancy and stated his understanding that, in order to be defined as redundant, the main reason for dismissal needed to be the fact that National Grid Group as a whole no longer required the particular kind of work undertaken or had a reduced need for it. Mr Ashworth said that he believed that, from a legal point of view, this meant that dismissal was, therefore, not for redundancy but some other substantial reason.

124. The claimant subsequently complained to the trustees of the pension scheme in which he was a member, contending that he should have been made redundant. He was in the national grid defined benefits scheme which had significantly enhanced benefits, not least unreduced pension from the age of 50, if required to leave employment because of redundancy between the ages of 45 and 50.

125. The pension scheme language did not mirror that of the statute in relation to the reason for dismissal. Rather, it appears to have been a

shorthand attempt to reflect the provisions on entitlement to a redundancy payment such that enhanced benefits would not be triggered if alternative employment was offered.

126. Seemingly as a result, the claimant's appeals to the trustees were, understandably, rejected. That was not, however, a matter before us, beyond it's relevance to the claimant's motivation and the potential for subsequent court proceedings.

The issues and the law

127. The list of issues were agreed between the parties.

1. Unfair dismissal

1.1. What was the reason or principal reason for dismissal? The Respondent says it was a substantial reason capable of justifying dismissal, namely that the Claimant refused to consent to the novation of his contract of employment to the Gas Business.

1.2. If it was not for a substantial reason justifying dismissal, was it for another potentially fair reason? The Claimant says he was dismissed by reason of redundancy.

1.3. Did the Respondent act reasonably in all the circumstances as treating that as a sufficient reason to dismiss the Claimant?

2. Remedy for unfair dismissal

2.1. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.2. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal? Eg.by his failure to accept new role. Would it be just and equitable to reduce the compensatory or basic award, because of such conduct? By what proportion?

3. Statutory Redundancy payment (ss.135 to 146 Employment Rights Act 1996)

3.1. Was the Claimant dismissed by reason of redundancy?

3.2. If so, was the Claimant entitled to a redundancy payment and, if so, how much? The Tribunal will consider, in particular:

3.2.1. whether the new role was suitable alternative employment;
3.2.2. whether the Claimant unreasonably refused an offer of suitable alternative employment;

4. Direct age discrimination (ss.13 and 39 Equality Act 2010)

4.1. The Claimant's age bracket is 45-50 years old and he compares himself with people in the age group under 40 years old

4.2. Did the decision of the Respondent to dismiss the Claimant on the grounds of SOSR (rather than redundancy) amount to less favourable treatment?

4.2.1. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

4.2.2. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was.

4.3. If so, was it because of age?

4.4. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its legitimate and social policy aims were (separately and/or collectively):

4.4.1. to retain an experienced employee whose skillset was needed to enable the standing up of a new business key to the energy infrastructure of the UK;

4.4.2. facilitating the participation of older workers in the workforce;

4.4.3. ensuring a spread of skills and experience in workers of all ages;

4.4.4. facilitating succession planning by enabling the Claimant to impart knowledge and experience before reaching a retirement age of his choice; and

4.4.5. to avoid significant cost, in circumstances in which the Respondent did not believe there to be a redundancy situation or in the event of redundancy considered there to be suitable alternative employment for the above reasons

4.5. The Tribunal will decide in particular:

4.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

4.5.2. Could something less discriminatory have been done instead;

4.5.3. How should the needs of the Claimant and the Respondent be balanced?

128. We were aided by the submissions of the parties and the references to relevant case law. We considered them all.

129. However, given our findings on the reason for dismissal, some of those fell away. Where appropriate, we have referenced statutory provisions and cases in our decision below.

130. We considered the burden of proof provisions in discrimination cases and that, if facts were established from which we could conclude less favourable treatment because of age, it would be for the respondent to show that their actions were in no way whatsoever tainted with discrimination.

Decision

131. The first point that we were asked to consider was the reason for dismissal.

132. The claimant said it was because he was redundant. The respondent said it was some other substantial reason and, specifically, the claimant's refusal to agree to the novation of his contract of employment to the gas business and to perform the role of head of pensions there.

133. We have to consider what the employer had in mind at the relevant time and whether their stated reason was genuine.

134. In that regard, therefore, we had to consider principally the evidence of Mr Hodgart.

135. We were satisfied that throughout Mr Hodgart was a credible witness who was trying to do the right thing by both the business and the claimant. He genuinely believed that the claimant's refusal to sign a novation letter to perform the gas head of pensions role was the reason for the dismissal.

136. He stated as much in the invite to a possible dismissal meeting, in the dismissal letter itself and in his evidence before us.

137. However, it was also clear that, in reality, as confirmed in the dismissal letter itself, the reason was that there was no role left for the claimant in the retained business, once he refused the alternative role.

138. So, whilst Mr Hodgart may not have believed that to be a redundancy situation, it is for us to go on to determine whether that belief was reasonable, including whether it was, in fact, a dismissal by reason of redundancy even though he genuinely believed otherwise.

139. Redundancy would, in any event, also be a potentially fair reason.

140. We were rightly referred by counsel for both parties to the relevant law on which there were no material disputes. We have considered section 139 Employment Rights Act 1996 and whether the test in Safeway Stores v Burrell [1997] ICR 523 was met.

141. The first part of that test was not in dispute as it was common ground that the claimant had been dismissed. We have to consider whether or not there was a redundancy situation and, if so, whether the dismissal was wholly or mainly attributable to it.

142. It was suggested on the part of the respondent that there was no reduction in the requirements of the business of the group for employees to do work of a particular kind.

143. The claimant's argument was based on focusing on his employer, the respondent, National Grid UK Ltd. It was not in dispute that there was a reduction in the need for employees to carry out pensions management work in that entity. There was a reduction of one band C pensions manager and, specifically, of the claimant's role.

144. The respondent's position was that they operated as the contracting entity for employees providing services across the UK group and some of the overseas business as a whole. Viewing the business as a whole, they said, meant there was no reduced requirement for pensions management work.

145. There was no dispute that the work previously done by the claimant would still need to be done, two thirds of it within the retained business and one third in the new gas business. The retained work was to be absorbed by a variety of other members of the team.

146. There was also no dispute that prior to the sale, at least, and for a time thereafter, the NGG gas business was an associated company or associated employer of the respondent.

147. The respondent's argument was that "business" is not defined in the Employment Rights Act 1996 and we should consider that the business of the respondent was in fact the business of the whole group.

148. We considered section 139 Employment Rights Act 1996 and specifically whether the requirements of the business of the employer for employees to carry out work of a particular kind had ceased or diminished or were expected to.

149. We could not accept that the "business" of any group company would inevitably mean the business of the whole group of which they were a part. If that were the case, it would appear to render s139(2) superfluous.

150. In any event, the business of the respondent company was, or at least included, employing people to provide services to the National Grid group, but that was to change as they were proposing for this to diminish in relation to the gas business and, following a transition period, to cease altogether. Ultimately, it was the group's intention to further diminish their minority shareholding also.

151. In short, supporting the gas business was, ultimately, no longer to be a part of the business of the respondent. The gas business would cease to be a wholly owned subsidiary of the group and was intended to become a self-sufficient standalone entity, notwithstanding the respondent initially maintaining a minority stake, ensuring it would remain an associated company or employer in the short-term.

152. That analysis appears to be confirmed by the fact that section 139 (2) addresses the potential for there being a reduction in employees across a group but not necessarily in the employing entity. This suggests that under s.139(1) we should be considering the employing entity initially and we would only look across the group if there was not a redundancy situation in the employing company. It appeared to be acknowledged by both sides that, on this analysis, there was.

153. In those circumstances, there was a reduced requirement for pensions management work at grade C within National Grid UK Ltd.

154. That is sufficient to render this a redundancy situation, subject to the third part of the Burrell test - whether or not the dismissal was wholly or mainly attributable to that event.

155. The respondent argued that the dismissal was for the claimant's refusal to novate and do the new head of pensions role in gas and that it wasn't, therefore, as a result of the redundancy situation.

156. However, for the reasons already highlighted, it seems to us it wasn't really the refusal to novate that resulted in the dismissal but, rather, that the refusal left the claimant in a position where there was a reduced requirement for pension management grade Cs within the respondent.

157. Accordingly, and acknowledging the surprising complexity and lack of clear precedent on this point, it appears to us that the reason for the dismissal was wholly or mainly attributable to the reduced requirement for pensions management work within the respondent. It was, therefore, a redundancy situation.

158. The fact that the respondent got that wrong in the dismissal letter does not, of itself, make the dismissal unfair. That said, it would go to the reasonableness, or otherwise, of the decision to dismiss for SOSR.

159. They argued for fair redundancy in the alternative and so we have considered the relevant principles in that regard.

160. Significant aspects of the process followed were, in our view largely fair and within the band of reasonable responses.

161. We accept that there were sound business reasons for the need for a restructure and that, in a complex situation like this, some kind of categorisation of roles was necessary.

162. We cannot say that the decision to categorise by virtue of a figure of 80% of the role remaining largely unchanged was outside the band of reasonable responses, despite other approaches, offering greater flexibility being available.

163. We did, however, have concerns that there was no apparent opportunity to challenge categorisation within the process nor indeed much opportunity to challenge the process itself, certainly in its early stages, either individually or collectively.

164. We also noted that, even when the claimant did raise concerns about categorisation in the review process, those matters did not appear to be responded to.

165. That said, we accept the evidence of Mr Hodgart that more than 80% of the prior role of GB, the other relevant band C pensions manager, was retained in the respondent's business, including significant US work, and so he was correctly categorised.

166. There was no material dispute that the claimant was correctly categorised. He accepted that less than 80% of his role was retained by the respondent.

167. We have already highlighted that it appeared that collective consultation started late and so the early stages of the process were not subject to appropriate review, including the categorisation, but it did appear genuine and meaningful thereafter resulting in, amongst other things, the review process for the assessments and allocations.

168. Similarly, with regard to individual consultation, that process did not provide for individuals to challenge their categorisation. That said, the claimant, an employee more than willing to argue his corner, did not seek to challenge his initial categorisation. It appears that he believed that, as a result, he was going to be made redundant and that was what he wanted, no doubt believing it would trigger entitlements worth many hundres of thousands of pounds.

169. When he did raise that issue, albeit only after he realised the respondent was offering him a potentially suitable alternative role, it didn't appear to be responded to adequately or at all.

170. The main issue around the case appears to be in relation to the actual allocation and assessment process. We don't accept that the claimant's scoring was unduly generous. It came from a genuine manager who was both seeking to do the right thing by the businesses, including the new gas business, which was still to be 40% owned by the respondent, as well as seeking to support a valued colleague with what he understood to be his career aspirations.

171. The claimant's argument that his scoring was too high, appeared to us to be bordering on disingenuous, given the respondent could support the

scores, including with recent appraisals. This caused significant concerns regarding the claimant's credibility when it came to other challenges about the suitability of the new role and his stated reasons for refusing it.

172. We consider that it was clear, from the contemporaneous correspondence that the claimant's principal, if not sole, focus was on securing enhanced redundancy and early retirement. He made the point repeatedly, consistently and robustly.

173. It probably came as more of a surprise to Mr Hodgart that the claimant wasn't happy, than it did to the claimant that he had been allocated a role.

174. Some of the process, particularly around the Korn Ferry percentages was, at best, oblique and / or arbitrary but, ultimately, we were satisfied by the evidence of Mr Hodgart that he genuinely considered the new role to be a more than suitable one for the claimant, for all the reasons that he set out in his email at the time and indeed before us.

175. We also don't accept that the three categories that the claimant suggested were 50% of the new role, amounted to anything like that.

176. For example, we accept the evidence of Mr Hodgart, who was best placed to know, that the HR reward element of the role would have been minor. We also accept that accounting knowledge and experience were not required, as Mr Hodgart did not have them himself, for his much larger role.

177. That is not to say that the claimant's alleged reservations were completely invalid in relation to areas where he claimed he lacked experience, such as in governance, but we consider that they were significantly exaggerated, seemingly because he had already decided that he wanted to be made redundant.

178. Ultimately, it appeared clear, albeit contrary to his claims before us, that the claimant had aspirations towards a head of pensions role. He had been working towards that goal through his performance appraisals by improving in certain identified areas. In those circumstances, a smaller head of pensions role, with a single scheme, such as that offered by the gas business, was, in many ways his ideal job.

179. Mr Hodgart genuinely believed the role to be suitable, as the claimant appeared to acknowledge at the time. All contractual terms were the same, including pay, benefits and location. Mr Hodgart adequately addressed those areas where the claimant said he lacked experience, not least by way of the transitional services agreement. This would have provided the claimant with the necessary support, training and skills in the interim period, enabling him to recruit specialists that could assist him in areas deemed necessary.

180. Mr Hodgart was clearly the person best placed to make that assessment being in the head of pensions role of the far larger business and having started in that role with limited accounting experience.

181. Accordingly, we did not accept that the new role was beyond the claimant's skills, experience or abilities, despite his claims. We were satisfied that the claimant could have done the role not least because, in evidence, he accepted that, had it paid more, he may well have accepted it. As a result, his contrary suggestion that he couldn't have done the role was not particularly credible.

182. We also note that the claimant dismissed the new role even before he had seen the job description. This further pointed to his real motivation, as did his disappointment at not being considered for the group head of pensions role when Mr Hodgart was appointed.

183. That said, we were concerned by the freezing out of the employment opportunities in the initial stage of the consultation process and also by the redeployment opportunities within the retained business not being available to those who had been allocated to gas, albeit we understand the respondent's need to populate the new business.

184. We also noted that the review process did not pick up on the claimant's claimed concerns about his categorisation and that the outcome of the review did not expressly address his three main concerns about the new role. They were, however, addressed by Mr Hodgart in his email produced as part of that process and they may well have been discussed with Mr Gibb.

185. Nonetheless, it was unfortunate that the claimant was not given an opportunity to directly respond at the time to Mr Hodgart's detailed written view on why the role was suitable. To some extent, it appeared that the respondent may also have started to become a little entrenched by that stage, probably in response to the claimant's combative assertions of his right to redundancy from the moment of his allocation.

186. The respondent accepted that the claimant wasn't offered a trial period. That said, the claimant was clearly aware of his right to a trial and at no stage suggested that he wanted one.

187. Again, on the respondent's case, this seemed to confirm that all the claimant was interested in was securing a finding that he had been dismissed for redundancy. It appears that the claimant believed, albeit wrongly in our view, that entitlements to enhanced payments and pension would follow on from that. That was, and remains, his primary motivation, perhaps understandably, given the numbers involved.

188. Overall, therefore, many aspects of the procedure were fair and reasonable from the start as was the need for the reorganisation.

189. However, the significant procedural concerns detailed above, for a respondent of this size and of these resources, were sufficient to take the case outside the band of reasonable responses.

190. Specifically,

a. the failure to provide any opportunity to challenge the categorisation process,

b. the collective consultation starting late,

c. individual consultation also starting late,

d. not even responding to the claimant's challenge of categorisation when he raised it,

e. not being taken through the specifics of Mr Hodgett's response about the suitability of the new role,

f. being denied redeployment opportunities within the retained business throughout,

g. giving the wrong reason for dismissal

h. not expressly offering a trial period

i. the responses to both the review and appeal did appear to be insufficiently detailed

191. As a result, the dismissal was procedurally unfair, and we have been asked to go on to consider the effects of Polkey and contributory fault.

192. It seems to us that there would have been no difference to the outcome, even if the respondent had rectified all of those failures.

193. If the process had a means of challenging categorisation, the claimant wouldn't have raised it initially as it appears he was happy to have been categorised as in scope for what he saw as potential redundancy.

194. Moreover, we don't believe that if he had challenged his categorisation, he would have been successful as we accept the evidence of Mr Hodgart that GB, the basis for his challenge before us, was correctly categorised, as was the claimant.

195. We also accept the evidence of Mr Hodgart that the alternative gas head of pensions role offered was, objectively, a suitable one.

196. The respondent viewed the claimant's refusal of the role to be unreasonable and based entirely on his desire to be made redundant.

197. It appeared to us that, at least from the date of his allocation to the gas business, if not before, that was the claimant's principal, if not his sole,

focus, which was evidenced in almost every email that he sent and in every meeting he attended.

198. That is not to say that the reasons for refusal provided did not have any potential validity, but they were not, in our judgment, the real reasons.

199. Once the respondent decided that they needed to restructure in the way that they did, the most suitable role available for the claimant was the one that he was offered, and he refused it. In those circumstances, anything that the respondent had done differently procedurally would have made no difference to the outcome in this case.

200. As a result, whilst there were procedural failings, we don't consider that there was any job that the claimant would have applied for had it been made available to him, nor was there any prospect of him accepting the role after a trial period. Accordingly, there was no prospect of any of those failings having any effect on the end result, even if rectified.

201. Any compensatory award, therefore, would be reduced by 100%.

202. It would not appear appropriate to make any further reduction based on the claimant's contributory conduct, notwithstanding what he have found to be his unreasonable refusal of the alternative role, nor his combative and closed-minded approach from the outset.

203. We have to consider the separate provisions in the Employment Rights Act 1996 about whether our findings above mean that the claimant was entitled to a redundancy payment.

204. The respondent submitted that he was not. They said that there was no redundancy situation. We have already determined that there was but, in the alternative, the respondent argued that the new role was suitable and unreasonably refused.

205. We consider that the new role offered was a suitable alternative under sections 141 and 146. It was on the same contractual terms including banding, salary, place of work and hours of work. The respondent set out the duties that were required and, we find, that it was a role that the claimant aspired to.

206. We were also satisfied that supportive measures were going to be put in place to deal with some of the claimant's claimed concerns. He would have been able to recruit into areas that he did not need specialist knowledge of, merely because they were matters within the responsibilities of his team.

207. His specific objections were not related to anything like his claimed 50% of the role, in any event. As mentioned, the HR engagement element was small, and would have been covered by another individual.

208. Overall, the fact that the claimant said that he would probably have accepted the new role for more money, suggested that it wasn't about the alleged skills gap, but more about the fact that he didn't want it.

209. That, of course, is not the end of the matter because it may still have been reasonable for him to refuse because he did not to want to do the new role.

210. The claimant advanced the same reasons in relation to role suitability, which, by virtue of the above, we did not consider credible. He also added, towards the end of the process and before us, some personal reasons.

211. These included alleged concerns about the potential stress and anxiety of additional responsibility and possible increased workload and adverse effects on his hours and work life balance.

212. However, we consider that the claimant did not give adequate or any meaningful consideration to the new role because he wanted to be made redundant from the outset. This was clear in his initial non engagement with the process and subsequently throughout his combative correspondence.

213. He rejected the role immediately on allocation, before he had even seen the job description, and was almost immediately threatening drawn out legal proceedings.

214. The claimant had, it appears, initially thought that he was going to be made redundant and, perhaps understandably, was happy, believing he would be entitled to significant payments and pension enhancements. There is nothing wrong with that.

215. We find that the principal reason for the refusal of the role was his desire to be made redundant and to seek those entitlements and his alternative stated reasons lacked credibility, partly as a result. We have little doubt that, but for his belief in those entitlements, he would have been delighted to accept the new role offered to both preserve his employment and progress his career.

216. We were not satisfied, in any event, by a number of his contentions in relation to the unsuitability of that role for the reasons already given, such as downplaying his own past performance and experience, or admitting that he would have considered it for more money suggesting there was less of a skills gap or potential stress issue.

217. We were satisfied by the evidence of Mr Hodgart that the alleged areas of concern were much smaller than the claimant suggested and were adequately addressed by the measures the respondent put in place.

218. It seems likely that, if anything, the claimant would have had greater flexibility over his working hours, work location and balance, once he had settled into his new role and recruited an appropriate team.

219. In all those circumstances, we consider that the claimant's refusal of the alternative role with an associated employer was unreasonable. The respondent has satisfied the burden on them in this regard. The claimant did not give adequate or meaningful consideration to the new job offered (Devon Primary Care Trust v Readman [2013] IRLR 879. His reasons fro refusal did not appear to us to be genuine.

220. Having unreasonably refused suitable alternative employment, the claimant is not entitled to a redundancy payment under s141 ERA.

221. The parties are reminded of the provisions of s121 Employment Rights Act 1996, which may assist with resolution of remedy issues.

222. The claim of age discrimination was based on the suggestion that it was because of the claimant's age that the respondent decided to dismiss on the grounds of SOSR rather than redundancy. So, the alleged less favourable treatment was not dismissal itself, but the reason given because the claimant believed, wrongly in our view, that a redundancy dismissal would trigger a significantly enhanced redundancy payment and very considerable early retirement benefits

223. We don't consider that there was any evidence to support that proposition beyond supposition. We accept the evidence of Mr Hodgart that age played no part in his reason for dismissal, even though the reason given was wrong.

224. We considered whether to draw adverse inferences from that error and the procedural failings identified earlier. However, we were satisfied that Mr Hodgart genuinely believed that the reason for dismissal was some other substantial reason, being the claimant's refusal to novate his contract and refusal to accept the alternative employment. That was understandable in the circumstances.

225. In any event, there was no evidence that the claimant's age itself played any part in the respondent's considerations, nor would it. There was no evidence of an actual comparator, aged below 40, being made redundant in circumstances where they had refused alternative employment. There were no facts from which we could conclude less favourable treatment than that which would have been received by a hypothetical comparator in similar circumstances.

226. It would, perhaps, have been viable to suggest that the claimant's potential entitlements played a part, but those entitlements were based on the claimant's start date, putting him in a subsequently closed pension scheme and / or his length of service giving rise to significant entitlements. As a result, they were, at best, indirectly related to age, which was not the claim before us.

227. Moreover, the only evidence that we had was that the respondent did make people redundant in the claimant's age bracket, and older, so there

was no evidence to suggest any correlation between the claimant's age and the respondent's approach to him and the reason for his dismissal.

228. It was, perhaps, surprising that the claimant's potential entitlements didn't play any part in the respondent's thinking, but we were satisfied by the evidence of Mr Hodgart that they didn't, as far as he was concerned, and he was the decision maker.

229. In any event, we were also satisfied that the respondent had a legitimate aim in terms of populating the new business with experienced colleagues, bearing in mind it was still to be the 40% owner of that business. It was both appropriate and necessary to require someone of the claimant's skills and experience to take the role identified, as, by far, the best candidate for the position.

230. Given that we consider it to have been suitable alternative role that was unreasonably refused by him, it would, therefore, have been proportionate for the respondent to deny the claimant windfall redundancy entitlements, whether statutory or otherwise, which were the underlying reason for the claimant's claims.

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Employment Judge Broughton

Date: 23 April 2024